

MEMO ENDORSED

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

CUSTOMS AND TAX ADMINISTRATION
OF THE KINGDOM OF DENMARK
(SKATTEFORVALTNINGEN) TAX REFUND
SCHEME LITIGATION

This document relates to case nos:

18-cv-07828; 19-cv-01785; 19-cv-01867; 19-cv-01893; 19-cv-01781; 19-cv-01783; 19-cv-01866; 19-cv-01895; 19-cv-01794; 19-cv-01865; 19-cv-01904; 19-cv-01798; 19-cv-01869; 19-cv-01922; 19-cv-01800; 19-cv-01788; 19-cv-01870; 18-cv-07827; 19-cv-01791; 19-cv-01792; 19-cv-01928; 19-cv-01926; 19-cv-01868; 18-cv-07824; 19-cv-01929; 19-cv-01803; 19-cv-01806; 19-cv-01906; 19-cv-01801; 19-cv-01894; 19-cv-01808; 19-cv-01810; 19-cv-01809; 18-cv-04833; 19-cv-01911; 19-cv-01898; 19-cv-01812; 19-cv-01896; 19-cv-01871; 19-cv-01813; 19-cv-01930; 18-cv-07829; 18-cv-04434; 19-cv-01815; 19-cv-01818; 19-cv-01931; 19-cv-01918; 19-cv-01873; 19-cv-01924; 19-cv-10713; 21-cv-05339.

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| ELECTRONICALLY FILED |
| DOC #: _____ |
| DATE FILED: 7/17/24 |

MASTER DOCKET

18-md-2865 (LAK)

**NOTICE OF PLAINTIFF SKATTEFORVALTNINGEN'S
MOTION TO EXCLUDE THE PROPOSED TESTIMONY OF STEPHEN E. SHAY**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated June 21, 2024, and the Declaration of Marc A. Weinstein, dated June 21, 2024, with all exhibits thereto, plaintiff Skatteforvaltningen, by its undersigned attorneys, will move the Court before the Honorable Lewis A. Kaplan at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, Courtroom 21B, at a date and time to be determined by the Court, for an order pursuant to Rules 702 and 403 of the Federal Rules of Evidence excluding the

Memorandum EndorsementIn re Customs and Tax Admin., Master Docket 18-md-2865 (LAK)

Defendants retained Stephen E. Shay, a former deputy assistant secretary of the Treasury for international tax affairs, as a proposed expert witness. Mr. Shay provided a 70-page expert report that in substantial measure argued on policy grounds that this case should not be entertained in view of the revenue rule. The Court emphatically has rejected the defendants' revenue rule arguments. *In re Customs and Tax Admin. (SKAT) Tax Refund Litig.*, No. 18-md-2865, 2023 WL 8039623, at *6–10 (S.D.N.Y. Nov. 23, 2023); *In re Skat Tax Refund Scheme Litig.*, 356 F. Supp.3d 300, 310–20 (S.D.N.Y. 2019).¹

Undaunted, defendants still propose to call Mr. Shay, but to testify with respect only to some of the contentions advanced in his report. In essence, they propose to eliminate most of the revenue rule arguments, leaving matters that, they contend, are relevant to the balancing of equities on certain of plaintiff's subsidiary claims for relief. Dkt. 1096 (Def. Mem.) at 4–5.

I have read carefully the portions of Mr. Shay's report that set forth the testimony the defendants still propose to adduce. While his comments concerning international tax policy, comparative national tax enforcement schemes, the (obvious) relationship between recovery of incorrect withholding tax refunds and collection of under withheld tax amounts, and other such matters are interesting as an academic or policy matter, they are of limited or no relevance to these cases. Many of them — particularly but not exclusively those comparing the Danish and U.S. tax systems and handling of dividend withholding — amount to summaries of aspects of the two countries' tax laws, which in any case would not be a proper subject of expert testimony because it would trench on the Court's role to instruct the jury as to relevant law, both domestic and foreign. *E.g.*, *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508–11 (2d Cir. 1977); Fed. R. Civ. P. 44.1. Without unduly extending this brief writing, the Court agrees that the testimony all should be excluded for the reasons stated in plaintiff's motion.

The motion is granted in all respects.

SO ORDERED.

Dated: July 17, 2024



Lewis A. Kaplan
United States District Judge

¹

The defendants' revenue rule arguments and their common law analog applied in the United Kingdom have been rejected also, in identical or nearly identical cases, by another judge of this Court and by the Supreme Court of the United Kingdom. *In re Kingdom of Belgium, Fed. Pub. Serv. Fin. Pension Plan Litig.*, 680 F. Supp.3d 460, 468–74 (S.D.N.Y. 2023) (Koeltl, J.); *Skatteforvaltningen (the Danish Customs and Tax Administration) v. Solo Capital Partners LLP*, [2023] UKSC 40.